United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-2046

To be argued by
RICHARD H. GIRGENTI

United States Court of Appeals

For the Second Circuit

UNITED STATES *ex rel.* JERRY GOMBERG,
Petitioner-Appellant,

against

LOUIS GRECO, Warden of the New York City Men's House of Detention of Riker's Island, or any other person having custody of Jerry Gomberg,
Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR RESPONDENT-APPELLEE

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Question Presented

Whether the prosecutor's conduct deprived the defendant of a fair trial.

Preliminary Statement

Petitioner Jerry Gomberg appeals from an order of the United States District Court for the Southern District of New York (WYATT, J.), entered on April 1, 1976, denying, without an evidentiary hearing, his petition for a writ of habeas corpus. On April 16, 1976, Judge Wyatt granted petitioner's motion for a certificate of probable cause for appeal to this Court.

On January 30, 1976, Gomberg filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. On February 13, 1976, the case was transferred to the United States District Court for the Southern District of New York.

In his petition below, Gomberg alleged that the trial prosecutor's conduct was so egregious that he was denied due process of law. Petitioner did not request an evidentiary hearing in the District Court. Instead, relying upon the evidence elicited at a post-trial hearing in state court on his motion to set aside the verdict, Gomberg alleged, *inter alia,* that the assistant district attorney who prosecuted him knowingly suborned and permitted certain prosecution witnesses to perjure themselves; failed to correct material falsehoods uttered by certain prosecution witnesses; failed to separate certain prosecution witnesses during the course of trial, thus presumably enabling these witnesses to reconcile their allegedly false and conflicting evidence; and misled the jury about promises made to certain prosecution witnesses in exchange for their testimony.

In response, Respondent argued that Gomberg's allegations of prosecutorial misconduct were premised upon a calculated misreading of the transcripts of his trial and post-conviction hearing. In fact, the record failed to disclose any evidence of misconduct on the part of the prosecutor. Moreover, some of Gomberg's allegations, even if true, did not amount to a denial of due process and thus, according to *Donnelly* v. *De Christoforo,* 416 U.S. 637, 642-43 (1974), were beyond a federal court's limited habeas corpus jurisdiction.

In denying Gomberg's petition for a writ of habeas corpus, Judge Wyatt wrote:

> After carefully reviewing petitioner's arguments as well as the voluminous record of the trial (supplied by the District Attorney, New York County), it appears that the points worthy of mention fall broadly into two categories: the District Attorney's alleged subordination of, and acquiescence in, (1) perjury to conceal improper attempts to make the testimony of prosecution witnesses appear consistent and (2) perjury to conceal the interest of witnesses in testifying for the People.
>
> With respect to the first category, the record fails to disclose any convincing evidence that Assistant District Attorney Kavanagh knowingly permitted the introduction of perjured testimony designed to conceal attempts to reconcile conflicts in the testimony of the various witnesses. Indeed, a review of the record discloses many conflicts in the testimony; this is admitted by counsel for the petitioner (see affidavit (p. 2) attached to petitioner's application).
>
> With respect to the second category, alleged perjury designed to conceal the interest of prosecution witnesses, the record again fails to disclose any convincing proof. It is true that the record is confusing as to whether Assistant District Attorney Kavanagh permitted witness Hatton falsely to testify that no public official had ever advised him that his cooperation would inure to his benefit. This confusion stems from an effort by Kavanagh to distinguish between promises made to the witness by officials *other* than himself and any such promise made personally by Kavanagh. While the record is thus confusing, it does not reflect any involvement by the prosecutor in the offering of perjured testimony. Moreover, the prosecution's case contained overwhelming evidence against Gomberg, wholly aside from the testimony of Hatton.
>
> This application is in all respects denied (A. 1-2).

STATEMENT OF FACTS

Background

In July of 1973, Petitioner Jerry Gomberg, along with George Kaplan and Martin Hodas, was indicted by a New York County Grand Jury. Indictment No. 3553-73. By this indictment Gomberg and his codefendants were charged with arson in the second degree and criminal mischief for their participation in setting two fires at midtown Manhattan massage parlors—one on May 10, 1972 at the Palace massage parlor and another on July 25, 1972 at the French Model Studio. On December 12, 1973, the trial of all three defendants commenced.

The People's Case

At trial, the People's case consisted largely of the testimony of three accomplices—Dexter Morton, Christopher Hatton and Earl Jones.* The evidence established that the three were employees of the defendants, Gomberg, Kaplan and Hodas, at the Geisha House, a midtown Manhattan massage parlor owned and operated by the defendants (A.

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* As brought out at trial, each of these witnesses had experienced prior difficulties with the law. Hatton had been convicted of perjury for falsely swearing to the truthfulness of an application for a passport in which he used a false name and address (A. 62, 80). He had also been convicted of fraud and criminal possession of stolen property (A. 62). Hatton also admitted assaulting a sixty-year-old man, punching another man in the eye and hitting a woman (A. 50-53).

Both Hatton and Morton had been arrested for impersonating police officers (A. 62-63).

Morton had also been convicted of burglary, petit larceny, receiving stolen goods and criminal trespass (A. 101).

Earl Jones had prior convictions for assault and disposing of mortgaged property (R. 629).

12, 14, 90, 123).* As expressed in numerous meetings and discussions in the spring and summer of 1972, the defendants were extremely disturbed that two competitor midtown massage parlors—the Palace and the French Model Studio—were charging lower prices than the Geisha (A. 12-15, 27-28). Eventually, Gomberg, Kaplan and Hodas decided they would have their competitors burned down (A. 20-21). The defendants' employees—Morton, Hatton and Jones—were the paid accomplices who actually set the fires at the Palace and French Model Studios.

a. The Palace Fire—the Plan, the Arson and Its Aftermath

In the latter part of April of 1972, Gomberg, Kaplan and Hodas first met with Dexter Morton and Christopher Hatton to discuss how they would put the Palace massage parlor out of business (A. 12-15, 17, 104-05). All three defendants discussed how the Palace was cutting into the business at the Geisha House by charging lower prices (A. 12-15). At this first meeting, Hatton suggested that he "break" up the interior of the Palace, but Hodas vetoed this idea (A. 17).

Over the next few weeks the defendants continued their discussions about putting the Palace out of business. Eventually, the defendants told Hatton that they wanted him to set fire to the Palace (A. 20-21). They suggested he "scorch up" the front of the Palace, and Hodas gave

* All numerical references preceded by "A." are to the pages of the "Joint Appendix" on this appeal. All numerical references preceded by "R." are to the pages of the printed record used in the Appellate Division, New York State Supreme Court, and of the proceedings held in the State trial court. By stipulation of counsel, the printed record has been made part of the original record of this appeal.

Hatton a diagram from which he could make a fire bomb (A. 20, 64-65). In the presence of Morton and all three defendants, Hatton built the fire bomb (A. 19-20, 64-65; R. 411, 493-95).

One of several conversations, held in late April or early May, between Hatton and the defendants was overheard by Dexter Morton (R. 407). During this conversation, Hodas, in the presence of Kaplan and Gomberg, was overheard discussing setting the Palace on fire (R. 407).

At various times Hatton was told by each of the defendants he would receive $300 or $500 [the price fluctuated] for setting the Palace on fire (A. 22; R. 321).

Although Hatton made the fire bomb, he was not anxious to set the Palace on fire (R. 317). When Hatton again suggested that he "break up" the massage parlor rather than set it on fire, Kaplan accused him of not having "any guts" (A. 22). Hodas added that if Hatton would not do the job, the defendants would get someone else to do it (A. 23). Gomberg suggested that Hatton could get the "nigger" [Dexter Morton] to do it. As Gomberg put it, "He [Morton] will do anything you [Hatton] say" (A. 23).

At a later time, Hatton overheard Gomberg offer Morton money to burn down the Palace (R. 321).

Eventually, on May 9, 1972, at the Geisha, Kaplan, having grown impatient, told Morton to set the Palace on fire that night (A. 94). As an incentive to set the fire, Gomberg promised Morton $300 and a plane ticket to Atlanta (A. 95-96).

In the early morning hours of May 10th, at approximately 5:30 a.m., Morton broke into the Palace and, using the fire bomb made by Hatton, set fire to the premises (A. 90-93; R. 411-12). After setting the fire, Morton called Kaplan to let him know that the fire had been set (R. 407-408).

The defendants were pleased with the results of the Palace fire. The morning after the fire both Chris Hatton and Dexter Morton were congratulated by Kaplan and Gomberg who said Morton had shown "a lot of heart" (A. 26). When Hodas met Morton and Hatton later in the day, he congratulated Hatton for a "good job" and shook Morton's hand (A. 26). According to Morton, that same day, in the afternoon, Gomberg drove Morton to the West Side Terminal where Gomberg purchased a round-trip plane ticket to Atlanta for Morton (R. 409). Morton also testified that, on the day before he flew to Atlanta, Gomberg gave him $200 and Chris Hatton $100 (R. 409-410). [Hatton contradicted Morton's testimony and said instead that it was Morton, not Gomberg, who gave him only $25 or $30, not $100, after the fire and that Morton also took him out drinking (R. 312, 328, 340).]

b. The French Model Studio Fire—the Threats to Valentine, the Plan, the Arson and Its Aftermath

After the Palace fire, the defendants continued in their efforts to eliminate their competition in the massage parlor industry. They now turned their attention to Nick Valentine who had recently dissolved his partnership with the defendants and had assumed the ownership of the competitor French Model Studio (A. 5, 6, 8-10). At trial, it was

Valentine's testimony that corroborated the testimony of the three accomplices.

According to Nick Valentine, early in July of 1972, he had a 45-minute meeting with Gomberg, Kaplan and Hodas (A. 5, 6, 8, 10). At this first of two meetings with Valentine, Hodas said "they [the defendants] were trying to organize the whole town and * * * everyone had to fall in step or else" (A. 6). Hodas added that Valentine "was out of step with everybody else" and that he "had to get in line and straighten out," otherwise "the same thing would happen that happened in the Palace" (A. 7). Gomberg joined Hodas in making this point (A. 7). Kaplan accused Valentine of being "stupid and stubborn" for the prices he was charging at the Studio (A. 7).

During the next couple of weeks in July, the defendants had several meetings at which they discussed how they would carry out their threats to Valentine. During these meetings the defendants said they wanted Hatton to set the studio on fire (A. 29). As he had during the discussions prior to the Palace fire, Hatton suggested he should break up the Studio instead of setting a fire (A. 29). Apparently the defendants at first went along with Hatton's suggestion, for Hatton and Gomberg then purchased a crow bar and sledge hammer which they stored behind a counter at the Geisha House (A. 29, 30).

However, in a later conversation at the Geisha House, Gomberg, in the presence of Dexter Morton, Kaplan and Hodas, once again suggested that Hatton should "scorch up" the front of the Studio (A. 31). Both Hodas and Kaplan agreed with Gomberg's suggestion (A. 31). Addi-

tionally, Kaplan warned Hatton, "if you go to do it, do it right and don't screw it up" (A. 31). Gomberg and Kaplan then told Hatton and Morton that they would each be paid $100 for setting the fire (A. 32, 33; R. 418).

According to Dexter Morton and Earl Jones, several days before July 25th, they saw Jerry Gomberg and Chris Hatton carry a container of gasoline into the Geisha from Gomberg's car (A. 112, 131, 132). In front of the Geisha House, Jones overheard Kaplan, in the presence of Gomberg, order Morton and Hatton to burn down the Studio (A. 128-131).

The defendants were growing impatient. On July 24th, Gomberg and Kaplan met with Morton. They complained about his failure to set the fire at the French Model Studio, and told him, "if you can't do it we will get somebody else to do it. It's got to be done. [We have] to have this guy closed for a couple of days" (R. 416-18).

On this same day, Earl Jones overheard Hodas tell Kaplan that Hatton and Morton were "messing around the job" and that it should have been done a week ago (A. 126, 127). Thereafter, Kaplan directed Jones, in the presence of both Hodas and Gomberg, to set the door of the French Model Studio on fire to "put a scare into those people so that they will know that we mean business" (A. 124, 125; R. 640). Gomberg added that "it should have been done a long time ago" (A. 125).

That night Dexter Morton saw Earl Jones at a bar. Jones said that he had been asked by Kaplan to "take care of" the Studio (A. 106). Morton told Jones not to get involved (A. 106). However, Jones rejected this advice

whereupon Morton said, "If you do it, call me at the Harem Hotel and I'll come down and make sure you call the fire department" (A. 106).

In the early morning hours of July 25th, Jones, who appeared to be "a little high" from drinking, went into the Geisha House where Chris Hatton had been sleeping (A. 66-67). There, Jones took the container of gasoline and some newspapers (A. 67), and went to the French Model Studio where he poured gasoline on the front door and lit it (A. 123). He then returned to the Geisha House and called Morton at about 4:30 or 5 a.m. to tell him what he had done (A. 106, 110, 111, 124). Morton then called Kaplan and told him that the fire had been set (A. 106, 107, 111).

After receiving the telephone call from Earl Jones, Morton met with him at the Geisha House (A. 124). At approximately 6 a.m., they went to the Studio, where the front door had been burned (A. 111). Jones said that he had been instructed by Kaplan to scorch the door only. Nonetheless, Morton said that Jones had not done a good job and that Kaplan would be angry (A. 135). Morton said he would have to complete the job (A. 107). Then Jones gave Morton some gasoline which had been left beside the building (A. 97-99, 107). Morton then kicked in the door, entered the premises, and poured the gasoline on the carpet, sofa and walls (A. 97-99, 107, 126, 133, 134).

The defendants gave mixed reviews to the Studio fire. On the day of the fire, Kaplan expressed his dissatisfaction over the manner in which the fire had been set. He told Morton that he had not done a good job (R. 419, 565). Earlier in the day, before Kaplan and Gomberg talked with

Hodas, Hodas congratulated Morton and told Morton that he would like to shake the hand of the man "who took care of Nick's place" (A. 101; R. 566). Afterwards, Chris Hatton heard all three defendants, who were apparently upset and angry, talking about how the fire had not been set properly (R. 163-64). The defendants were concerned that the fire had not burned properly and were fearful that someone might have seen the fire set (R. 163-64). Eventually, Gomberg and Kaplan terminated Jones' employment because "[the fire] didn't go off right" (Hatton: 339).

A few weeks after the Studio fire, Nick Valentine had a second meeting with the defendants at the Dixie Hotel (R. 49). Kaplan again said that Valentine was "stupid and better get in line with the rest of the people" (R. 50). Gomberg warned Valentine to "wise up" or they would just keep burning [him] out" (R. 50). Hodas added that he owned 42nd Street and there was no place on it for Valentine any more (R. 50).

c. The Witnesses' Pre-trial Accounts of the Two Fires

On both direct and cross-examination, Hatton, Morton and Jones admitted that at different times after the Palace and Studio fires they gave varying accounts of their own and the defendants' involvement. The following is an attempted chronicle of these varying accounts.

Approximately a month or so after the July, 1972 Studio fire, Chris Hatton was questioned by fire marshals (A. 34, 36). On cross-examination, Hatton admitted telling the marshals that he did not know anything about the fires (R. 199-200).

A short time after being questioned by the fire marshals, Hatton met with Gomberg, Kaplan and attorneys Kassner and Detsky at the Mykinos Restaurant (A. 35, 37; R. 383-85, 389). On direct examination Hatton testified that he was asked to write out a statement on a yellow legal pad about what he knew of the fires (A. 37). In this statement, Hatton said that neither he, Gomberg or Kaplan had anything to do with the fires (A. 38). On recross-examination, Hatton admitted that after he first wrote out the statement he was told that he could "do better than that" and was instructed what to write (A. 84). After his third attempt, the statement was completed and signed (A. 84).

Approximately three days before he was arrested on August 16th, Earl Jones learned from Kaplan that he would be questioned by fire marshals about the fires (R. 697). Thereafter, Jones spoke with Morton about the fire marshals' investigation (R. 700-01). On August 16th, Jones and Morton were arrested by fire marshals and questioned separately about their roles in the fires (R. 421, 606-07, 699).

At this time, Dexter Morton first admitted his involvement in the Palace and Studio fires (R. 429).* However, on cross-examination he testified that he lied to the fire marshals when he told them that he was drunk at the time he set the Palace fire (A. 120). Earl Jones also admitted on cross-examination that he lied to the fire marshals by telling them that Chris Hatton, not himself, had set the fire at the French

* Morton subsequently lied to Attorney Kassner, who had been hired by Gomberg and Kaplan to represent Morton (R. 424). Morton told Kassner that he had not admitted his involvement in the fires to the marshals; he lied because he wanted Gomberg and Kaplan to get him out of jail and was afraid that they would not help him if they learned that he confessed (R. 530-31).

Model Studio (A. 136). Later that day, the defendants were taken to the District Attorney's Office for further questioning (R. 608).

In August of 1972, Chris Hatton was again questioned by fire marshals while he was in the prison hospital at Rikers Island (A. 69). Hatton, who was serving a sentence for attempted burglary and possession of burglar's tools in an unrelated case, told the fire marshals who had set the fire and also implicated Kaplan and Gomberg (R. 193; A. 68, 69, 78, 79). However, Hatton did not tell the fire marshals that he had made the fire bomb used by Dexter Morton to set the first fire. Nor did he mention that he had received money from Morton after that fire (A. 68, 69, 78, 79).

Sometime between August of 1972 and April of 1973, Hatton was again interviewed by fire marshals in prison (R. 190-92). He then admitted for the first time that he had gone with Gomberg to purchase the gasoline used to set fire to the French Model Studio (R. 201-02).

In April of 1973, Hatton, Morton and Jones were brought into the District Attorney's Office and questioned separately (R. 352, 561; A. 138). Hatton was advised by the assistant district attorney that nothing he said would be used against him and that any cooperation he would give would be brought to the attention of the proper authorities (A. 49, 74). He was never promised that he would not be arrested for arson or that his sentence would be lessened (R. 358; A. 82, 83; R. 378-79). Hatton then told the assistant district attorney that the defendants had offered him money to burn down the Palace and Studio (A. 49, 74; R. 324, 371-74).

At this time, however, he did not admit that he had made the fire bomb used by Morton or that Morton had paid him (R. 202-03). Since he was "afraid for his life," Hatton also denied that Hodas was involved (R. 324-25).

On the same day in a separate interview, Earl Jones was also advised by the assistant district attorney that his cooperation would be brought to the attention of the proper authorities (A. 138, 139). Hoping that he would benefit himself, Jones, for the first time, then admitted his involvement in the Studio fire (A. 137, 138).

Also, on the same day and in a separate interview, Morton described what he knew of the Palace and Studio fires (A. 118). However, Morton, like Hatton, was afraid of Hodas and did not tell the prosecutor that he had overheard Hodas tell Hatton to set the Palace fire (R. 561-62, 564-66). Like Hatton and Jones, Morton was not promised anything for implicating the defendants, but he nevertheless hoped that his cooperation would benefit him (A. 118, 119, 121).

In October of 1973, Gomberg and Kaplan drove Chris Hatton to the law offices of Kassner and Detsky to speak with Mr. Detsky (R. 342, 382-83; A. 88). There, Hatton gave Detsky a statement which was tape recorded and which Hatton later admitted, on cross-examination, was a lie (R. 342). In this statement Hatton falsely stated that the prosecutor had played a tape recording of Dexter Morton's statement in which Morton accused Hatton of setting the fires (R. 355-56). Hatton also falsely told Detsky that he had denied knowing anything about the fires to the prosecutor and that the prosecutor had threatened to take his good jail time away from him (R. 356-58). On cross-examination,

Hatton also admitted that he had lied in this statement when he said that Nick Valentine had offered him money to kill Gomberg and Kaplan (R. 358-59).*

Approximately three weeks before the start of the trial in December of 1973, Hatton, accompanied by Gomberg, went to see Hodas at his office (R. 212). However, he denied that he had asked Hodas for $100 for not implicating Hodas to the District Attorney (R. 213).

The Defendant's Case

The defense, in its vigorous cross-examination of the People's witnesses and in its own direct case (R. 745-888), attempted to discredit the veracity of the prosecution's witnesses. In addition, defendant Hodas presented evidence (R. 763-888), which was contradicted (R. 805-808, 828, 829, 833, 834, 861, 862, 864, 865), that he was merely a landlord of the Geisha House, not an owner, and thus had no monetary motive to set fire to the competitor massage parlors.

The Jury Verdict

On December 20, 1973, the jury returned a verdict of guilty as to Jerry Gomberg and George Kaplan on both counts of arson in the second degree. Martin Hodas was acquitted of all charges.

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* Hatton did testify, however, that in the summer of 1972, Valentine had offered him $250 to wreck the Geisha House and that he did damage the Geisha House (Hatton: 213-15).

The Post-Trial Motion and Hearing

In a motion dated February 14, 1974, Jerry Gomberg and George Kaplan asked that their convictions be set aside on the ground, *inter alia,* that the prosecutor's misconduct at trial, his subordination of perjury and his withholding of material evidence denied him a fair trial (R. 1098). Commencing on February 28, 1974, a hearing was held before Honorable Richard Denzer, Justice of the Supreme Court of the State of New York and the presiding justice at the defendants' trial.

At the post-trial hearing Chris Hatton and Dexter Morton recanted much of their trial testimony. In addition, they testified that they had been encouraged to lie at trial by the prosecutor and the fire marshals investigating the two arsons (R. 1141, 1148, 1150, 1153-56, 1162, 1325, 1349, 1355-56, 1368, 1487-89, 1491-92, 1503, 1508-11, 1534). Hatton and Morton also testified that in exchange for their testimony they were given plane tickets out of New York State and small amounts of cash by the District Attorney's Office (R. 1144, 1145, 1161, 1267, 1268, 1530, 1531). Hatton testified further that he had been promised by the fire marshals and the prosecutor that if he cooperated he would be helped with his parole (R. 1343), he would not be charged with arson (R. 1141, 1156, 1269-70, 1325, 1368), and his escape charge for fleeing from a halfway house, where he was on parole, would be dismissed (Hatton: 1267-68, 1370-71). Morton testified that he had been promised he would only receive a suspended sentence if he cooperated (R. 1487-89, 1530-31).

In addition to Hatton and Morton's testimony, the defense presented newly discovered evidence impeaching Valentine's testimony and supporting their contention that they had been denied effective assistance of counsel. [However, the issues raised by this evidence are not the subject of Gomberg's habeas corpus petition.]

The People's evidence at the post-trial hearing consisted of the testimony of Assistant District Attorney Edward Kavanagh and Fire Marshal Thomas Russo. In material part, this evidence substantially contradicted the defense testimony.

With respect to Chris Hatton, Assistant District Attorney Kavanagh testified Hatton had only been promised that anything he said would not be used against him and that his cooperation would be in his best interests (A. 216). Kavanagh denied telling Hatton what his testimony should be (A. 219-20) and denied any collusion, having admonished all of the prosecution's witnesses not to discuss their testimony with each other (A. 205). Only after the trial had begun and Hatton had expressed fear for his safety, because of his testimony, did Kavanagh promise Hatton he would be given $100 and a plane ticket to Los Angeles (A. 202, 203, 227). Fire Marshal Russo denied promising Hatton anything other than that his cooperation would be brought to the district attorney's attention (R. 1614).

With respect to Dexter Morton, Assistant District Attorney Kavanagh denied making any specific promise to Morton for his testimony at trial. Kavanagh testified that he spoke with Dexter Morton's attorney about whether Morton would cooperate in the arson investigation (A.

195). Kavanagh told Morton's attorney that if Morton cooperated the prosecution would not recommend that Morton be sentenced to more than five or seven years (A. 209, 210). However, Kavanagh told Morton's attorney not to tell Morton about any specifics of the possible sentence recommendation, but merely to tell Morton that, as his attorney, it was in Morton's best interests to cooperate. Whenever Kavanagh spoke to Morton he only told Morton that it would be in his best interests to testify (R. 1419-1420). Indeed, it was one week after the defendants' trial when Morton himself pleaded guilty to arson that Morton and his attorney learned for the first time the prosecution intended to recommend a conditional discharge (A. 200; R. 1438).

Assistant District Attorney Kavanagh also testified that he always told Morton to tell the truth as he recalled it (A. 199). Kavanagh also told Morton to acknowledge that he expected to benefit from his testimony (A. 218).

Since Morton, as well as Jones, were afraid for their lives after testifying, both witnesses were also given plane tickets so they could leave New York (R. 1472).

Fire Marshal Russo also testified the only promise he made to Morton was that his cooperation would be brought to the district attorney's attention (R. 1545, 1546). Russo denied ever threatening Morton or telling him that he would receive a suspended sentence if he cooperated (R. 1546, 1547). At no time did Russo hear any member of the District Attorney's Office promise Morton he would receive a lighter sentence if he testified for the prosecution (R. 1573).

The Court's Decision on the Post-Trial Motion

On April 19, 1974, prior to the imposition of sentence, Justice Denzer denied the defendants' motion in a lengthy opinion read from the bench (R. 1671-1707). Specifically, Justice Denzer discredited Hatton's and Morton's testimony at the post-trial hearing and found it to be unbelievable on its face (R. 1689-1704).

The Defendants' Sentence and State Appeals

On the same day that Justice Denzer denied the defendants' post-trial motion, he sentenced Gomberg and Kaplan to indeterminate terms of imprisonment not to exceed seven years.

On December 3, 1974, the Appellate Division, First Department, of the New York State Supreme Court, unanimously affirmed, without opinion, the defendants' judgment of conviction. *People* v. *Gomberg,* 46 A.D.2d 850 (1st Dept. 1974).

On December 29, 1975, the New York State Court of Appeals, in an opinion by Judge Jasen, unanimously affirmed the Appellate Division's order of affirmance. *People* v. *Gomberg,* 38 N.Y.2d 307 (1975). With respect to Gomberg's claims of prosecutorial misconduct, the Court of Appeals wrote, "we have considered same and find them to be without merit." 38 N.Y.2d at 316, *supra.*

POINT

The prosecutor's conduct at trial did not deprive the defendant of a fair trial.

On this appeal, Jerry Gomberg asks this Court to reverse the order of the District Court (Wyatt, J.), denying his petition for a writ of habeas corpus. Gomberg contends, as he did in the court below, that his petition should have been granted because he was deprived of a fair trial and due process of law by the prosecutor's alleged misconduct at trial.

As the court below noted, Gomberg's contentions, broadly stated, fall into two categories: first, the district attorney's alleged subornation of, and acquiescence in, perjury to conceal improper attempts to make the testimony of prosecution witness appear consistent, and second, the district attorney's alleged subornation of, and acquiescence in, perjury to conceal the interest of witnesses in testifying for the People (A. 1). However, a careful reading of the record of the state court proceedings reveals that Gomberg's claims are substantially inaccurate and premised upon a calculated misreading of the testimony at trial and at the post-conviction hearing. Judge Wyatt was amply justified in concluding that the record failed to disclose any convincing evidence that the assistant district attorney knowingly permitted the introduction of perjured testimony designed to conceal attempts to reconcile conflicts in the testimony of the prosecution witnesses, or to conceal their interests in testifying (A. 1-2).

A. Gomberg's allegations that the District Attorney concealed improper attempts to make the testimony of prosecution witnesses appear consistent [answering appellant's brief, Points I, II, III, VIII, IX and XIII]

Gomberg argues that he was denied a fair trial because the prosecutor improperly concealed attempts to make the testimony of his witnesses appear consistent. In support of this contention, Gomberg argues that the prosecutor suborned, and acquiesced in, perjury by permitting Hatton and Morton to lie about the times they had spoken to the prosecutor about their testimony. Gomberg argues further that the prosecutor failed to separate his witnesses, thus presumably permitting them to resolve conflicts in their testimony. Not only do these contentions lack support in the record, but their accuracy and significance are substantially belied by the numerous inconsistencies and conflict which actually appeared in the testimony and statements of the prosecution's witnesses. *See* Appellant's Brief, at 2; Appellee's Brief, at 11-15, *supra.*

(1) Gomberg contends that Hatton lied, with the prosecutor's knowledge, by testifying that he spoke with Assistant District Attorney Kavanagh only on two occasions and only once immediately before trial. Appellant's Brief, at 3-6. To support this contention, Gomberg relies on Kavanagh's testimony at the post-conviction hearing where Kavanagh said that he spoke to Hatton "several times" (A. 208) and had Hatton, Morton and Jones "on more than one occasion in the area of my office" (A. 224). Gomberg claims that Kavanagh's post-trial testimony and Hatton's trial testimony contradicted each other on the number

of times Hatton and Kavanagh spoke with each other and Gomberg, therefore, concluded that the prosecutor knowingly permitted Hatton to perjure himself. However, Gomberg's assertion that Hatton lied about speaking to Kavanagh only twice is inadequately supported; his reliance upon Kavanagh's testimony at the post-conviction hearing is misplaced.

To begin with, there is absolutely no basis for concluding that Hatton lied about only talking with the prosecutor twice, and thus there is no basis for concluding that the district attorney suborned or permitted perjury. Indeed, it was the prosecutor himself who insured that the jury was fully apprised of the fact that Hatton had spoken to him prior to trial. On direct examination, Hatton testified that he first spoke with Assistant District Attorney Kavanagh just prior to taking the stand (A. 39). Realizing that the witness had testified incorrectly, Kavanagh, on his own initiative, asked permission to reopen direct examination (A. 40). He then asked Hatton if he recalled speaking with him and another assistant district attorney earlier in April of 1973 (A. 41-42). Hatton then recalled that he had (A. 42). Surely, there was no inconsistency in Kavanagh's ambiguous post-trial testimony that he spoke to Hatton "several times" (A. 208) and Hatton's own testimony that he spoke to Kavanagh twice (A. 48).

Moreover, by quoting, out of context, various portions of Hatton's and Kavanagh's testimony, Gomberg ignores the fact that they were often testifying about different matters and thus there was no contradiction in their testimony. For example, when Hatton testified at trial that he spoke with Kavanagh once in April of 1973 and

another time immediately before trial (A. 41, 42, 47), Hatton was never asked and, therefore, never testified about whether there were other times when he was in the area of Kavanagh's office, but did not speak to Kavanagh. Similarly, when Kavanagh testified at the post-trial hearing, that he had the accomplices in the area of his office "on more than one occasion" (A. 224), he was not asked and, therefore, did not testify about whether he spoke to each accomplice, including Hatton, every time they were in the area of his office. Moreover, Gomberg's argument that there was an inconsistency in Kavanagh's and Hatton's testimony is further confused since Kavanagh was testifying about the number of times he had all three accomplices in the area of his office (A. 223-24). Hatton, on the other hand, was only testifying about the times he, not the other accomplices, actually spoke to Kavanagh (A. 41, 42, 47).

(2) In addition, Gomberg contends that Kavanagh permitted Hatton to perjure himself by testifying that, prior to taking the stand in December of 1973, the last time he spoke to Dexter Morton was about the time when Morton was arrested in August of 1972 (A. 56). Appellant's Brief, at 6-7. Again Gomberg supports his conclusion by relying on Kavanagh's testimony at the post-conviction hearing that he had Morton, Jones and Hatton in his office on several occasions (A. 224). As before, Gomberg's reliance on Kavanagh's post-conviction testimony is misplaced. In no way does Kavanagh's testimony contradict Hatton's or indicate that Hatton lied at trial.

To begin with, Hatton and Kavanagh were again testifying about different things. Hatton was testifying about

the times he had spoken to Morton. Kavanagh was testifying about the times Hatton and Morton were together in Kavanagh's office, but not necessarily speaking to each other. In fact, Kavanagh testified that although the witnesses were often together in the area of his office, they did not discuss the case with each other (A. 204).

Moreover, Kavanagh and Hatton were referring to different times. Kavanagh's statement, made after trial, that he had Morton, Jones and Hatton in his office several times would include the period before and during trial. Hatton's statement, made at the beginning of trial, that he had not spoken to Morton since his arrest could only have included the period of time prior to trial.

(3) As with Hatton, Gomberg erroneously argues that the prosecutor permitted Morton to perjure himself by testifying that he had only spoken to Assistant District Attorney Kavanagh once between April of 1973 and the time of trial in December of 1973 and that the sole purpose of this single 30-minute meeting was to advise Morton that the defendants' trial was beginning soon. Appellant's Brief, at 7-10. Thus, Gomberg argues that the jury was left with the erroneous impression that Morton had not prepared his testimony with the prosecutor. Gomberg again supports his contention by pointing to Kavanagh's testimony at the post-conviction hearing where Kavanagh said that he spoke to Morton several times before trial (A. 198, 207). However, a more complete reading of the record reveals that there was no inconsistency in the witnesses' testimony and no basis for believing that Morton perjured himself.

On cross-examination during Gomberg's December, 1973 trial, defense counsel, Herbert Kassner, asked Morton how

many times had he spoken to the district attorney (A. 113). Morton replied "three or four times" (A. 113). In response to counsel's questions, Morton then testified that the last time he spoke with the district attorney was "[l]ast week"; however, he did not discuss the arsons at that time because the district attorney "already knew" about the fires (A. 114). The witness testified further that he had not gone over his grand jury testimony or any other prior statements during this December meeting (A. 114-15). Morton then said that the purpose of his approximately 30-minute meeting with the district attorney was to let Morton know he would be testifying soon (A. 115-16). Defense counsel asked no further questions about what transpired at the meeting (A. 116).

Defense attorney Kassner then asked Morton when he had spoken to the district attorney prior to this 30-minute meeting in December of 1973 (A. 116). At first, Morton was uncertain, but at Kassner's suggestion the witness testified that, prior to December 1973, he spoke to the district attorney about the arsons in April of 1973 (A. 116-18). Defense counsel did not ask Morton about any other meetings with the district attorney.

At the post-trial hearing, Kavanagh testified he had had "several conversations" with Morton prior to trial (A. 198).

From a review of this testimony it is obvious that Morton had not lied and that his testimony was consistent with Kavanagh's. For, surely, there is nothing inconsistent in Kavanagh's ambiguous testimony that he had "several conversations" with Morton (A. 198), and Morton's own tes-

timony that he spoke to Kavanagh "[t]hree or four times" (A. 113). Part of the confusion with Gomberg's contention arises because he ignores that part of Morton's testimony where Morton said he spoke to Kavanagh "[t]hree or four times" (A. 113) (see Appellant's Brief, Point III, at 7-10). Having ignored this critical testimony, it is easy to see how Gomberg could erroneously claim that Morton's and Kavanagh's testimony was in conflict.

Moreover, the prosecutor never withheld from the jury or defense counsel the fact that he talked with Morton about his testimony. Morton freely testified about his meetings with the prosecutor (A. 113-18) and admitted telling the prosecutor the story of the arsons that he testified about at trial (A. 118). Defense counsel was always able to cross-examine Morton about his meetings with the district attorney. If counsel was not satisfied with any of Morton's responses, he was free to delve into the responses in greater detail. Thus, for example, if during cross-examination, the defendant was not satisfied with Morton's response that in an approximately 30-minute interview with the prosecutor he had only been told that he was "going to trial soon and just tell the truth" (A. 115-16), counsel should have pursued this statement through further cross-examination. However, counsel obviously chose not to and was satisfied with arguing to the jury that Morton's testimony about this 30-minute meeting was incredible on its face (A. 168-69).

(4) Next, Gomberg argues that Assistant District Attorney Kavanagh permitted the People's witnesses to speak with each other and that Kavanagh perjured him-

self at the post-trial hearing by testifying that he never had the witnesses together. Again the record does not support appellant's contention. Moreover, this is not the sort of claim which falls within the scope of this Court's limited habeas corpus review. *Donnelly* v.*DeChristoforo,* 416 U.S. 637, 642-43 (1974).

Near the end of Chris Hatton's testimony, defense counsel requested that the assistant district attorney not discuss Hatton's testimony with the other witnesses and that Hatton be kept away from the other witnesses (A. 72-73). However, the court never ruled on this request (A. 72-73). Thus, even if the witnesses were together and did speak with each other, they were not violating a court ruling, since none had been made.

In any event, during the course of trial, the prosecution was required to keep Morton, Jones and Hatton in the same room at the end of the hall in the court building (A. 204). Since Morton and Jones were incarcerated and Hatton, who was concerned for his own safety, was in protective custody, this arrangement was required for security reasons (A. 86-96, 118-19, 221-22). However, Kavanagh strongly admonished all of the witnesses not to discuss their testimony with each other because he was aware of the inconsistencies in their testimony (A. 86-96, 118-19).

On one occasion during a recess in Hatton's testimony, Hatton asked Kavanagh, in the presence of the other witnesses, how he had done (A. 86, 395). Kavanagh told him that he had done fine, but it was up to the jury to decide (A. 86, 118). When Hatton asked "Why?" Kavanagh simply replied that he thought Hatton had told the truth,

but he had lied before, and Kavanagh did not know how the jury would react (A. 86, 118). However, at no time were the specifics of Hatton's testimony discussed with the other witnesses. Furthermore, the subject of this conversation was revealed to the court (A. 86).

Moreover, although he strenuously denied any collusion in the witnesses' testimony, Kavanagh candidly admitted to the trial court, and in his testimony at the post-conviction hearing, that the People's witnesses were together at various times (A. 86-87, 204, 221-22). If defense counsel was troubled by the witnesses' presence together, he was free to cross-examine them about their preparation for testifying and what, if anything, they might have said to each other during recesses. The fact that there were numerous inconsistencies in the testimony of the witnesses certainly supports Kavanagh's denial of collusion.

Finally, Gomberg's contention that the prosecutor failed to segregate his witnesses is not the sort of claim which falls within the scope of this Court's limited habeas corpus review. *Donnelly* v. *DeChristoforo*, 416 U.S. at 642-43, *supra*. In *Donnelly*, the Supreme Court said that the federal court could review state proceedings for violations of due process but could not exercise the broad supervisory power that it would possess in regard to its own trial court. *Id.* at 642. While many of appellant's other contentions might, if true, amount to a denial of due process, no case suggests that the prosecutor's failure to segregate his witnesses, even if required by the state court, violated the defendant's federal constitutional rights.

B. Gomberg's allegations that the district attorney concealed the interest of witnesses in testifying for the People [answering appellant's brief, Points IV, V, VI, VII, X and XV]

The second broad category in which appellant's contentions fall is that the prosecutor suborned, and acquiesced in, perjury to conceal the interest of the People's witnesses in testifying. However, a careful examination of the record again reveals no impropriety.

(1) Gomberg contends that Kavanagh permitted Hatton to perjure himself by testifying that no public official ever advised him that his cooperation would inure to his benefit. Appellant's Brief, at 10-12.

Although it is true that on direct examination Hatton incorrectly denied that any public official had told him that his cooperation would benefit him (A. 58, 60), this misstatement was quickly clarified on cross-examination when Hatton unequivocally testified that the prosecutor had told him that his cooperation would be brought to the attention of the proper authorities (A. 74). Thus, Hatton's misstatement was not left uncorrected and the jury was fully apprised of Hatton's interest in testifying.

However, on redirect examination, Assistant District Attorney Kavanagh asked Hatton, "Were you ever promised anything by me concerning your cooperation in testifying before the three defendants in this case?" Hatton answered, "No" (A. 81). Gomberg now argues that by this question and answer, Kavanagh attempted to revive Hatton's misstatement on direct that he had not been told

his cooperation would be brought to the attention of the appropriate authorities (A. 60). Appellant's Brief, at 11. However, Gomberg is mistaken. As the District Court correctly pointed out, when Gomberg raised this point below, "[Gomberg's] confusion stems from an effort by Kavanagh to distinguish between promises made to the witness by officials *other* than himself and any such promise made personally by Kavanagh." (A. 2). Apparently, it was Assistant District Attorney Jacobs, not Kavanagh, who in an April 1973 interview with Hatton told him that his cooperation would be brought to the attention of proper authorities (R. 203-04; A. 81-82). Thus, Hatton testified accurately when he said that the prosecution had promised him that his cooperation would be made known (A. 74), but that Assistant District Attorney Kavanagh had personally promised him nothing (A. 81).

Moreover, there was no evidence that Hatton had any other interest in testifying. At no time was Hatton ever specifically promised anything for his testimony. He was never told that he would not be arrested for his admitted role in the arsons (A. 82-83); nor was he told that any outstanding warrants would be vacated (A. 203). Hatton was given $100 and a plane ticket to Los Angeles. However, the $100 and the plane ticket were given to Hatton upon his representation to Kavanagh that he was afraid for his life because of his testimony at trial (A. 202-03). Neither the ticket nor the money were given to Hatton for his cooperation or pursuant to any bargain struck with the prosecution for his testimony. Rather, they were given to Hatton because the district attorney, based on Hatton's representations, believed that they were necessary to protect his safety. Indeed, it was first agreed that Hatton would

get the $100 and the plane ticket sometime during trial, after Hatton had already decided to cooperate and after he indicated he was afraid for his life (A. 202, 227). Thus, the district attorney was forthright and accurate when he told the jury in his summation that "[T]here is no question that Mr. Hatton is on the witness stand and has something hanging over his head * * * [but] [h]e told you that I had promised him nothing" (A. 186).

(2) Further, Gomberg contends that the prosecutor permitted Morton to perjure himself at trial by testifying that he was unsure that his testimony would help him get out of jail (A. 100). Appellant's Brief, at 12-15. By relying on Kavanagh's testimony at the post-conviction hearing, that he instructed Morton to tell the jury he expected to get some time off by testifying at trial (A. 218), Gomberg attempts to show that Morton did not reveal his interests in testifying. For further support of his argument, Gomberg also relies on Kavanagh's representation to Morton's attorney, Mr. Krieger, that the prosecutor would recommend a maximum sentence of five to seven years if Morton testified (A. 197-98). However, a more careful examination of the record reveals that Morton did not misrepresent his interest in testifying and thus was not induced by the prosecutor to perjure himself.

At the time of Gomberg's trial, Dexter Morton had already spent 16 months in prison awaiting his own trial for his participation in the massage parlor arsons (R. 429). On cross-examination, Morton was asked, "Do you feel giving testimony here today will help you get out of jail?" (A. 100). He answered, "Not as I know of, but I hope something might happen, I'm helping myself" (A.

100). Later, on the People's redirect examination, Morton again expressly admitted his interest in testifying.

> Q. Now, just a few more questions, Mr. Morton. Have you, at any time, by either myself or Mr. Jacobs, been promised anything for testifying in this case? A. No.
>
> Q. Do you expect to gain anything by testifying here? A. Sure.
>
> Q. What do you expect to gain? A. I expect somebody to help me.
>
> Q. But, no one, either myself nor (*sic*) Mr. Jacobs has ever promised you anything; is that correct? A. That's right.
>
> The Court: Rather, you hope and expect but nobody has promised you anything.
>
> The Witness: Yes. (A. 121-22).

In his summation, the district attorney addressed himself directly to Morton's interest in testifying when he said:

> There is no question, even according to their own testimony, that they [Morton and Jones] are motivated to testify in this case not because they are concerned with cleaning up New York, not because they want to become good productive citizens, but they are motivated to take that stand simply because they want to help themselves. They have a sentence hanging over their head and they are extremely concerned with the length of it. If it can help them to a lesser sentence, they will take the stand. I can see that. I don't argue that point (A. 187-88).

In his own summation, defense counsel also argued this point to the jury (A. 169).

Thus, there was never any doubt that Morton expected to receive a lesser sentence for his cooperation and testi-

mony against the defendants. And, contrary to Gomberg's contention, the assistant district attorney fulfilled his obligation by eliciting from Morton his interest in testifying and in explaining this admitted interest to the jury.

Although the prosecutor told Morton's attorney, Mr. Krieger, that, if Morton cooperated, the prosecutor would probably recommend that Morton only receive a maximum of five to seven years (A. 197-98), Krieger was told not to tell Morton about this possible recommendation.* Instead the prosecutor merely said to advise Morton that his cooperation would be in his best interest (A. 197-98). Notwithstanding, any ethical obligation Krieger may have had to inform Morton of the specifics of the district attorney's tentative offer, there is no evidence in the record that Morton ever learned of the offer to his attorney. And thus, there is no evidence that Morton lied about not knowing of a specific promise of leniency.

C. Gomberg's miscellaneous contentions [answering appellant's brief, Points XI, XII, XIV, XVI, XVII and XVIII]

In addition to those contentions which fall broadly into the categories discussed above, Gomberg raises a number of other allegations of prosecutorial misconduct. Even if true, none of these additional contentions raise federal constitutional issues; and are thus outside the scope of this Court's habeas corpus review. *See* Appellee's Brief, at 28, *supra*. *Donnelly* v. *DeChristoforo*, 416 U.S. at 642-43, *supra*. Moreover, a review of these contentions reveals no impropriety.

* Apparently, the offer was not firm since the prosecutor ended up recommending that Morton be sentenced to time served and a conditional discharge (A. 200).

(1) Gomberg complains that the district attorney failed to arrest Chris Hatton for his role in the massage parlor arsons. And, despite an outstanding warrant for his arrest, due to his failure to return to a halfway house, the prosecution provided Hatton with a plane ticket and $100. *See* Gomberg's Brief, at 20-23.

In examining this contention, it is most important to note what Gomberg does not argue. At no time does Gomberg suggest that Hatton's status as a fugitive was hidden by the prosecution. In fact, the district attorney's failure to prosecute Hatton as an escapee was vigorously argued to the jury in the defense's opening (A. 4), and summation (A. 160) and was amply delved into during the cross-examination of Hatton (A. 59-60, 69-70).

Furthermore, Gomberg does not contend that Hatton's role in the massage parlor arsons was hidden from the jury, because in fact it was amply revealed. On direct and cross-examination, Hatton admitted that he had made the fire bombs used by Morton to set the Palace fire (A. 19-20, 64-65). Also, during the People's case it was revealed that Hatton purchased a container of gasoline for use in the Studio fire (A. 112, 131-32). At no time was Hatton's role in the arsons hidden from the jury. The defense was free to cross-examine Hatton about this as well as his parole violation and any possible remuneration that he was promised for testifying.

Having revealed Hatton's role in the arsons and the outstanding warrant for his arrest, whether the prosecution actually arrested him for these activities is of no concern to Gomberg or to the fairness of his trial. This is

especially so since Hatton was never promised that he would not be arrested in exchange for his testimony. Moreover, the district attorney's discretion to charge individuals with crimes and to insure the safety of witnesses by providing them with the funds and means to go to another jurisdiction is beyond question.* *See generally United States* v. *Bland,* 472 F.2d 1329, 1335-36 (D.C. Cir. 1972); *People* v. *Eboli,* 34 N.Y.2d 281 (1974).

(2) Next, Gomberg contends that the prosecutor permitted Nick Valentine to lie at trial. Appellant's Brief, at 24-25. Gomberg does not even attempt to explain what it is that Valentine was supposed to have lied about. Instead, appellant refers, out of context, to Kavanagh's statement to Valentine that he would not be getting a plane ticket, because he lied at trial (R. 1445). It is true that Kavanagh admitted making this somewhat improvident statement. However, what Gomberg conspicuously ignores is Kavanagh's very next statement, admitting that Valentine was told he had lied, but completely denying that, in fact, Valentine had lied (R. 1446). In view of this clarification by Kavanagh and absent any examples of perjured testimony by Valentine, Gomberg's contention must fall.

(3) Gomberg next contends that the prosecutor acted improperly by not keeping Nick Valentine available as a witness and by refusing to stipulate to the existence of pending indictment against Nick Valentine's common law wife, Martha. *See* Gomberg's Brief, at 26-28. This argu-

* Apparently, the district attorney's concern for the safety of his witnesses was well founded. Both Chris Hatton and Dexter Morton were badly injured after their trial testimony (A. 189-91, 192-93, 228; R. 1485, 1496).

ment is based on an incomplete reading of the record, for at no time was the prosecutor obliged to enter into a stipulation or to produce Valentine as a witness.

At the end of Nick Valentine's testimony, the court excused him with the reminder that he had to appear if he was called again to testify (A. 11). However, the court did not order the prosecutor to make Valentine available. Later, during the trial, defense counsel said that he wanted to show that Nick Valentine's interest in testifying was to help his common law wife, Martha, who was allegedly under indictment. The defense intended to prove that Martha Valentine was under indictment by either entering into a stipulation with the prosecutor or by recalling Valentine to the stand (A. 142-45).

Before the prosecutor decided whether to enter into the stipulation, or was ordered to produce Valentine as a witness, the court, in the exercise of its discretion, ruled that the defense could not introduce evidence of Martha Valentine's indictment. Thus, the issue of whether the prosecution would be required to enter into a stipulation or to produce Nick Valentine as a witness was taken out of the case by the trial court's ruling.

(4) Finally, Gomberg complains that in his summation the prosecutor told the jury that he had given the defendants a copy of the taped conversation between Nick Valentine and the fire marshals; and since Valentine was not cross-examined about the tapes, the jury could infer that Valentine's statements on the tape were consistent with his trial testimony (A. 184-85). *See* Gomberg's Brief, at 28-29.

This statement was not objected to, and the issue of its propriety was hence not preserved for the state court's review. CPL §470.05(2). Regardless of whether the failure to object constituted a deliberate bypass of the state procedural requirements [*see Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *United States ex rel. Terry* v. *Henderson,* 462 F.2d 1125 (2d Cir. 1972); *United States ex rel. Cruz* v. *LaVallee,* 448 F.2d 671 (2d Cir. 1971), *cert. denied,* 406 U.S. 958 (1971)], we have found no case, nor has appellant [*see* Gomberg's Brief, at 28], that similar comments by prosecutors are constitutional error.

Conclusion

The order appealed from should be affirmed.

Respectfully submitted,

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July, 1976

Service of 3 copies of the
within Brief is hereby
admitted this 2nd day of
July 1976

Signed Kasper & Dubsky P.C. by Charles Epstein

Attorney for Petitioner-Appellant